

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of	:	
	:	
Review of the Section 251 Unbundling	:	CC Docket No. 01-338
Obligations of Incumbent Local Exchange	:	
Carriers	:	
	:	
Implementation of the Local Competition	:	CC Docket No. 96-98
Provisions of the Telecommunications Act of	:	
1996	:	
	:	
Deployment of Wireline Services Offering	:	CC Docket No. 98-147
Advanced Telecommunications Capability	:	

**Comments of the
Pennsylvania Public Utility Commission**

Matthew A. Totino
Assistant Counsel

Frank B. Wilmarth
Deputy Chief Counsel

Counsel for the Pennsylvania Public
Utility Commission

P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000

DATED: March 18, 2002

TABLE OF CONTENTS

INTRODUCTION	1
DISCUSSION.....	4
I. The Commission should continue to identify a minimum set of network elements that must be unbundled on a national basis, while states should continue with the authority to add to the list	4
II. The development of federal unbundling standards should not rely on any federal UNE or Special Access performance standards that may be established.....	7
CONCLUSION	9

INTRODUCTION

On December 20, 2001, the Federal Communications Commission (Commission) released a Notice of Proposed Rulemaking (*NPRM*) initiating its first triennial review of its policies regarding unbundled network elements (UNEs).¹ This *NPRM* is one of several proceedings initiated by the Commission that mark the beginning of Phase II of the Commission's local competition and enforcement efforts under the Telecommunications Act of 1996 (TA-96).² With its triennial review, the Commission seeks to ensure that its regulatory framework remains current and faithful to the pro-competitive, market-opening provisions of TA-96, in light of the recent regulatory, technological, and marketplace developments in the telecommunications industry.³

¹ An incumbent local exchange carrier (ILEC) must make parts of its telephone network available to competing carriers, nationally, on an unbundled basis. See 47 U.S.C. §§251(c)(3), 251(d)(2). These network elements include: (1) loops (including dark fiber); (2) subloops; (3) network interface devices; (4) local circuit switching; (5) interoffice transmission facilities (including dark fiber); (6) signaling networks and call-related databases; and (7) operations support systems. *Implementation of the Local Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3771-3890, paras. 162-437 (1999)(*UNE Remand Order*). The Commission has also added the high frequency portion of the loop to this list of UNEs that an ILEC must offer. *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Provisions of the Telecommunications Act of 1996*, Third Report and Order at CC Docket No. 98-147 and Fourth Report and Order at CC Docket No. 96-98, 14 FCC Rcd 20912 (1999). In addition, the *UNE Remand Order* established that the Commission would revisit its unbundling rules every three years. *UNE Remand Order*, 15 FCC Rcd at 3766, para. 151 & n. 269.

² The FCC has also sought comment on a discrete set of national performance standards that could improve enforcement of an ILEC's wholesale obligations under TA-96. See *Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al.*, Notice of Proposed Rulemaking, CC Docket No. 01-318, FCC No. 01-331 (rel. November 19, 2001); See *Performance Measurements and Standards for Interstate Special Access Services, et al.*, Notice of Proposed Rulemaking, CC Docket No. 01-321, FCC No. 01-339 (rel. November 19, 2001). The FCC also seeks comment on the proper regulatory treatment of ILEC broadband services. See *Development of Regulatory Framework for Incumbent LEC Broadband Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC No. 01-360 (rel. December 20, 2001).

³ *NPRM* at para. 1.

Generally, the Commission requests comment on numerous aspects of its unbundling framework, including:

- The application of the “necessary” and “impair” standards,⁴ as well as whether and how the FCC should take into account other goals of TA-96, such as encouraging broadband deployment, investment in facilities, and technological innovation.
- A more targeted approach to defining specific network elements, such as whether or not the unbundling rules should vary by type of service, geography, or other factors.
- The proper role of state commissions in the implementation of unbundling requirements for ILECs.

Specifically, with respect to state commissions, the Commission seeks comment on the extent to which state commissions can act in creating, removing, and implementing unbundling requirements and the statutory provisions that would provide authority for states to act, consistent with applicable limitations on delegations of authority to the states.⁵ The Commission asks whether it should establish national standards that states would apply to ILEC networks or, alternatively, whether states are better situated to tailor unbundling rules that more precisely fit their markets.⁶

The Commission also inquires as to whether the development of federal unbundling rules should rely on any federal performance standards that may be established in the UNE and Special Access performance measures and standards

⁴ In determining what network elements should be made available, the Commission must consider, at a minimum, whether access to such network elements is necessary and whether the failure to provide such network access would impair the ability of a telecommunications carrier to provide the services it seeks to offer. 47 U.S.C. §251(d)(2)(A),(B). The stricter “necessary” standard applies to proprietary network elements. The “impair” standard applies to non-proprietary network elements. *UNE Remand Order* at paras. 29 & 31.

⁵ *NPRM* at para. 75.

⁶ *Id.* at para. 76.

proceedings. The Commission asks whether it should rely on an ILEC's consistent compliance with a performance standard for a particular UNE in a state as a factor for delisting the element in that state. Finally, the Commission seeks comment on its proposal to convene a Federal-State Joint Conference to coordinate its UNE review pursuant to section 410(b) of TA-96.⁷

In these comments, the Pennsylvania Public Utility Commission (PAPUC) addresses the proper role of the state commissions in the implementation of ILEC unbundling requirements. First, the PAPUC asserts that the Commission should continue to identify a minimum set of network elements that must be unbundled on a national basis, while continuing to allow the states to add to the list. Second, the PAPUC urges that the development of federal unbundling standards should not rely on any federal UNE or Special Access performance standards that may be established.

⁷ *Id.* The Commission is authorized to confer with any State commission having regulatory jurisdiction with respect to carriers regarding the relationship between rate structures, accounts, charges, practices, classifications, and regulations of carriers subject to the jurisdiction of such State commissions and of the Commission. 47 U.S.C. §410(b). In this *NPRM*, the Commission seeks comment on a proposal to convene a Federal-State Joint Conference to inform and coordinate its triennial UNE review. See *Petition of the Competitive Telecommunications Association*, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed November 26, 2001). The PAPUC agrees that it may be advantageous for the Commission to establish some kind of formal mechanism to secure state participation in the application of the "impair" standard under section 251(d)(2), especially when considering the on-going nature of the triennial review and the state regulators' experiences with and perspectives on the current UNE regime. However, without more detailed information on the specifics of the Federal-State Joint Conference and how it would operate, the PAPUC is reluctant to formally support CompTel's proposal at this time.

DISCUSSION

Both the Commission and the PAPUC have recognized that non-discriminatory access to UNEs is a critical component of a successful local telephone competition regime. As the Commission has noted, “the ability of requesting carriers to use unbundled network elements . . . is integral to achieving Congress’ objective of promoting rapid competition to all consumers in the local telecommunications market.”⁸ As the PAPUC has noted, non-discriminatory access to UNEs is essential if telephone competition is to spread throughout all parts of Pennsylvania. To move telephone competition beyond large business customers located in urban areas where new entrants have built their facilities, new entrants into the local telephone market “need to be able to lease the piece parts of the BA-PA’s⁹ ubiquitous network under non-discriminatory rates, terms, and conditions.”¹⁰

I. The Commission should continue to identify a minimum set of network elements that must be unbundled on a national basis, while states should continue with the authority to add to the list.

The PAPUC supports the continuation of a minimum set of network elements that must be unbundled on a national basis. The continuation of this requirement furthers the statutory purpose and design of section 251(d)(2) to provide competitive carriers with access to unbundled network elements that allows them to provide the services those

⁸ *UNE Remand Order* at para. 5.

⁹ *Bell Atlantic Pennsylvania, Inc., n/k/a Verizon Pennsylvania Inc.*

¹⁰ *Joint Petition of Nextlink Pennsylvania, Inc. et al., and Joint Petition of Bell Atlantic Pennsylvania, Inc. et al.*, Docket Nos. P-00991648 and P-00991649 (order entered September 30, 1999)(*Global Order*) at 63. The PAPUC initiated the *Global* proceeding to resolve numerous outstanding telecommunications proceedings stemming from Chapter 30 and the TA-96 and to bring local competition to all Pennsylvania citizens.

carriers seek to offer. To that end, a national minimum list of UNEs provides competing carriers with certainty regarding the availability of these network elements.¹¹ This certainty is significant, especially when considering that the leasing of network elements continues to play a pivotal role in the entry of competing carriers into the local telephone markets in Pennsylvania. The continuation of national minimum UNE requirements will help sustain this mode of entry.

Moreover, the PAPUC believes that the continuation of a national list of required UNEs is still necessary to further facilities-based competition. As previously noted by the Commission, it is through the self-provisioning of their own facilities that competing carriers have a greater ability to serve all classes of customers. To that end, the Commission concluded that a national list of required UNEs would facilitate the deployment by competing carriers of their own facilities. The Commission reasoned that permitting competing carriers to access network elements on a broad basis would allow the carriers to acquire sufficient customers and essential market information that would enable them to determine whether construction of new facilities is justified.¹² The PAPUC believes this same analysis remains applicable.

Although the PAPUC supports the continuation of a national minimum list of required UNEs, the PAPUC also believes that the list must remain flexible. That is, states should maintain the ability to add network elements to the list. Such authority allows an individual state to tailor its UNE requirements to the needs of that particular state and to address state-specific issues, including those of a technical, demographic, or geographic nature. The PAPUC specifies that this authority should include a state's ability to re-list a network element that has been de-listed by the Commission as long as the additional obligations comply with TA-96 and the relevant state law.

¹¹ *UNE Remand Order* at para. 125.

¹² *Id.* at para. 134.

Pennsylvania has authority under both federal and state law to add to the national minimum UNE list. In the *UNE Remand Order*, the Commission interpreted section 251(d)(3) of TA-96¹³ to grant authority to state commissions to impose additional obligations upon ILECs so long as the additional obligations met the requirements of section 251 and the national policy framework instituted in that order.¹⁴ The PAPUC asserts that there is no reason to depart from the Commission’s policy regarding a state’s ability to modify the national list of UNE obligations as set forth in the *UNE Remand Order*.

Furthermore, as pronounced in the PAPUC’s *Global Order*, Pennsylvania has authority to impose additional UNE obligations under “Chapter 30” of its Public Utility Code.¹⁵ Chapter 30 requires a LEC to “unbundle each basic service function on which those competitive service depend . . .”¹⁶ Thus, to the extent that a LEC receives and accepts competitive classification of its business services, the LEC must unbundle the “basic service functions”¹⁷ on which the “competitive” local service depends. In the

¹³ Section 251(d)(3) permits state commissions to establish access obligations that are consistent with the Commission’s unbundling rules. Section 251(d)(3) specifically states that “in prescribing and enforcing regulations . . ., the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section and purposes of this part; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.” 47 U.S.C. §251(d)(3).

¹⁴ *UNE Remand Order* at para. 154. However, the Commission also found that state-by-state removal of elements from the national list was not consistent with the requirements and purposes of TA-96. *Id.*

¹⁵ In 1993, the Pennsylvania General Assembly amended the Public Utility Code by adding “Chapter 30,” 66 Pa. C.S. §§ 3001-3009, which introduced competition in the provision of telecommunications services and flexibility in terms of pricing and profits. Chapter 30 was adopted to promote lower prices, improved service quality, and the deployment of an advanced telecommunications network in pursuit of economic growth throughout all of Pennsylvania. *See* 66 Pa. C.S. §3001.

¹⁶ 66 Pa. C.S. §3005(e)(1).

¹⁷ Chapter 30 defines “basic service functions” as “those basic components of the local exchange carrier network which are necessary to provide a telecommunications service and which represent the smallest feasible level of unbundling capability of being tarified and offered as a service.” 66 Pa. C.S. §3002.

Global Order, the PAPUC noted that Verizon's Centrex, Paging, Repeat Dialing, Speed Dialing, and High Capacity Special Access services had been declared competitive in Pennsylvania. Therefore, any basic service functions used to provide those services were ordered to be unbundled.¹⁸

II. The development of federal unbundling standards should not rely on any federal UNE or Special Access performance standards that may be established.

In the *NPRM*, the Commission requests comment on whether the development of federal unbundling standards should rely on any federal performance standards that may be established in the UNE and Special Access performance measures and standards proceedings. For example, the Commission asks whether it should rely on consistent ILEC compliance with a performance standard for a particular UNE in a state as a factor for de-listing the element. The PAPUC urges that federal unbundling rules should bear no relationship to any federal performance standards that may be established.

To that end, the PAPUC opposes the use of performance standards as a factor in determining whether to de-list a UNE for a particular state. The PAPUC asserts that there is no relationship whatsoever between good performance (an ILEC meets the performance standard for a particular UNE on a consistent basis) and relief from the statutory "impair" standard under section 251(d)(2) of TA-96. The good performance of an ILEC does not demonstrate that denial of access to the relevant UNE would not impair the ability of a CLEC to provide the proposed service. If anything, good performance may demonstrate that a particular UNE is frequently ordered, suggesting that a lack of access would impair the ability of a competing carrier to provide the proposed service.

¹⁸ *Global Order* at 67-68. The PAPUC noted that loops, switching, and transport were part of the Centrex offering, while loops and transport were also part of special access offering. *Id.*

Moreover, the possibility of deteriorating performance or “backsliding,” which could occur even after consistently good performance, also supports that the Commission should not use compliance with performance standards as a basis to de-list UNEs. It is important to note that consistently good ILEC performance with a particular UNE does not necessarily provide a guarantee as to its future performance with that UNE. Thus, reliance on ILEC compliance with a particular UNE performance standard could provide a false sense of security as to whether competing carriers have non-discriminatory access to that UNE.

CONCLUSION

The PAPUC provides comments on the proper role of the state commissions in the implementation of ILEC unbundling requirements. First, the PAPUC asserts that the Commission should continue to identify a minimum set of network elements that must be unbundled on a national basis, while continuing to allow states to add to the list. Pennsylvania has authority under both federal and state law to add to the national minimum UNE list. Second, the PAPUC urges that federal unbundling rules should bear no relationship to any federal UNE or Special Access performance standards that may be established.

Respectfully submitted,

Matthew A. Totino
Assistant Counsel

Counsel for the Pennsylvania Public
Utility Commission

P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000

DATED: March 18, 2002